In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-664

DAVID CALVIN BECKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of the knowing possession of goods which had been stolen from an interstate shipment, in violation of 18 U.S.C. 659. He received a sentence of five years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (Tr. 483-484). While an appeal was pending in the court of appeals, petitioner moved for a new trial in the district court based upon newly discovered evidence. After a hearing, the district court denied the motion (Pet. App. B). Thereafter the court of appeals, which

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had postponed decision pending a ruling on the new-trial motion, affirmed both the conviction and the denial of the motion for a new trial (Pet. App. A).

1. At the trial it was stipulated that in September 1969, 142 cartons containing Sears Roebuck & Company television sets, each valued in excess of $100.00, were stolen while part of an interstate shipment moving through Chicago, Illinois and that shortly thereafter the cartons were received by petitioner at the warehouse of his corporation, World Wide Warehouse, Inc., in Chicago (Tr. 102–105).

The remaining element of the offense to be established was petitioner's knowledge that the television sets in his possession had been stolen. On this aspect of the case the evidence showed that in September 1969, petitioner sold several new Sears television sets to one Howard Pearlstein at a price well below their current market value (Tr. 140–163). Pearlstein paid cash, at petitioner's insistence, but he neither requested, nor was he given, any receipt (Tr. 143–144, 151–153, 160–162, 260). At the time of these transactions, Sears sold its television sets exclusively through Sears' own outlets, and no Sears warehouse or authorized storage place was located at petitioner's warehouse (Tr. 117–119).

Miss Muriel Osten, petitioner's secretary and bookkeeper (Tr. 181–183, 265), testified that she prepared a warehouse receipt for the television sets around September 12, 1969, the day that they were allegedly delivered to petitioner's warehouse by a "Standard

Distributing Company" (Tr. 199–203, 233, 237, 244).[1] The government, to offset her testimony, called as a witness Robert Burns, president of the printing company which supplied petitioner's corporation with its warehouse forms (Tr. 296–297). He testified that his company had twice printed such forms for petitioner, in September 1968 and October 1969 (Tr. 311–313). Comparing the warehouse receipt issued for the television sets (allegedly prepared around September 12, 1969) with a sample form from the first printing (delivered to petitioner in September 1968), Burns gave his opinion that the receipt for the sets was not from the first printing of forms (Tr. 317–319). Although not provided with a sample from the second printing to use for comparison purposes, Burns concluded that the receipt issued for the sets must have come from the second printing, which was not delivered to petitioner until October 1969 (Tr. 320–321). Thus, Burns' testimony tended to show that the warehouse receipt issued for the sets was a fabrication.

[1] Miss Osten testified for the prosecution and the defense. Through her testimony, petitioner sought to show that he had received the television sets in the normal course of his business from a man identifying himself with a "Standard Distributing Company" (Tr. 272, 357–362, 365–367). According to this testimony, petitioner never learned the man's name or his company's address, although it was customary to do so (Tr. 239–240, 272, 371,, 373). On cross-examination Miss Osten stated, contrary to her previous testimony as a prosecution witness, that she could not recall when she had prepared the warehouse receipt for the sets (Tr. 380–383). Her testimony in this case subsequently resulted in her conviction for perjury (Pet. App. A 5, n. 4).

Petitioner filed a motion for new trial in the district court more than 15 months after his conviction, alleging "newly discovered evidence" establishing that Burns had testified falsely at the trial. The motion was based on the affidavit of document expert Donald Doud, which indicated that the warehouse receipt issued for the television sets could not have belonged to the second printing of forms. In Doud's opinion, the receipt in question had come from the first printing (Pet. 6–7). After a hearing, the district court denied the motion in a written opinion (Pet. App. B).

2. Petitioner contends here, as he did below, that the district court abused its discretion by denying a new trial (Pet. 11–14). This contention was fully considered by the court of appeals and was properly rejected in Part II of its opinion upon which we rely (Pet. App. A 6–9). Applying the rules set forth in *Larrison* v. *United States*, 24 F.2d 82 (C.A. 7), the court held that petitioner had failed to show either that he was unable to meet the Burns testimony or that a second trial might have a different outcome (Pet. App. A 7–9). The court pointed out that the Doud affidavit did not "show conclusively" that Burns' testimony was mistaken, but only presented a contrary expert opinion (Pet. App. A 9). Thus this is not a case in which perjury by a government witness has been committed; indeed, it is not even certain that the witness's testimony was mistaken. Rather, the courts below found that in the context of this trial it was unnecessary to decide whether Burns inadvertently had given erroneous testimony, since other

evidence overwhelmingly established petitioner's guilty knowledge and a new trial would not have led to a different result (Pet. App. B 13).

We point out in addition that petitioner's reliance (Pet. 11–13) on *Mesarosh* v. *United States*, 352 U.S. 1, is misplaced. In that case the government had discredited the credibility of a key government witness by revealing that in other proceedings he had given extensive false testimony which was either perjurious or resulted from a psychiatric disorder. In contrast, as we have explained, this case involves not false or discredited testimony but rather an honest expert opinion, the accuracy of which could have been, but was not, challenged at trial by cross-examination or the presentation of contrary expert opinion. *Mesarosh* does not stand for the proposition that a defendant may obtain a new trial on the basis of his own failure to offer expert defense witnesses at the proper time.[2]

3. Petitioner now contends for the first time that the Burns testimony influenced the trial court to impose a more severe sentence (Pet. 14–16). Petitioner

[2] Petitioner also urges the Court to resolve an alleged conflict among the circuits as to whether the use of perjurious testimony must be willful to violate due process (Pet. 14). This case presents no such issue since the Burns testimony, at most, was shown to have been partially mistaken. The only witness who committed perjury was Miss Osten, who testified favorably to the defense (Pet. App. B 11; see note 1, *supra*). Moreover, while it is settled that a conviction resulting from the prosecution's willful use of perjury cannot stand (*Miller* v. *Pate*, 386 U.S. 1), in the absence of such misconduct, the standard used by the courts below in judging petitioner's new trial motion was proper. See *United States* v. *Strauss*, 443 F. 2d 986, 989–990 (C.A. 1), certiorari denied, 404 U.S. 851.

has not moved for a reduction in sentence pursuant to Rule 35, Fed. R. Crim. P., and this issue is not properly before the Court. *Lawn* v. *United States*, 355 U.S. 339.

4. Petitioner's related contention that the government wilfully asserted the truth of the "false" Burns testimony in its brief filed in the court of appeals is without foundation. The statement in the government brief upon which petitioner relies related to Burns' qualifications to give his expert opinion, not to the correctness of the opinion given. Burns' competence as an expert witness was being challenged on the initial appeal, and it was on that point that the government had argued—and the court below later agreed (Pet. App. A 5–6)—that his testimony was admissible.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

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